in priority and beneficial use arise. Fundamentally, though, the holding is more radical than the contract theory, for it tends to prevent to even a greater extent the operation of the inherent power of government to regulate for the public welfare.

D. J. W.

CONSTITUTIONAL LAW: PUBLIC AND PRIVATE BUSINESS: RIGHT OF STATE LEGISLATURE TO DECLARE ANY BUSINESS PUBLIC.—Public service legislation[1] is forcing to a definite issue before the courts the question of how far a state legislature may go in declaring a business to be a public service or utility. Constitutional amendments, some of which, as in California,[2] confer upon the law-making body plenary power to define public utilities, have been followed by the passage of public utilities acts including new business in the category of public callings, and the interests affected having no recourse under the state constitutions, have resorted to the federal constitution[3] in an effort to defeat the new acts. Such was the situation when the California legislature included under the definition of public utilities all corporations and persons supplying water to others.[4] The California Supreme Court was called upon to interpret this provision in the case of *Allen v. Railroad Commissioners of California*,[5] which arose before the Railroad Commission when a company supplying water on an enormous scale under contracts applied to have its rates regulated. The consumers objected that to grant the petition would impair their contract rights. The court agreed with this view and practically annulled the statute by holding that "Our Constitution and our statutory definitions . . . . must be construed as applying only to such properties as have in fact been devoted

---

[1] Every state in the union except Delaware now has a public utilities law of some kind. See note in 9 Illinois Law Review, 656, where all states are mentioned except Delaware, Utah and Wyoming. Wyoming enacted such a law in 1915, however, and Utah followed in 1917.

[2] Art. XII, § 23. ". . . . every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation."

[3] In practically all cases cited in these notes strong reliance was placed by the business concerned on the fifth or the fourteenth amendment.

[4] Cal. Stats. 1913, Ch. 84, p. 80, § 1. "Whenever any person, firm or private corporation . . . . owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility . . . ."

In the Public Utilities Act the term "water corporation" is defined as including "every corporation or person . . . . owning, controlling, operating or managing any water system for compensation within this state." Cal. Stats. 1915, Ch. 91, p. 118, § 1, subd. X.

[5] (Oct. 1, 1917), 56 Cal. Dec. 326.

to a public use and not as an effort to impress with public use properties which have not been devoted thereto." Otherwise, the court reasons, there would be an unjust interference with private property or private contractual rights in violation of the fourteenth amendment. The old California doctrine of "dedication" as expressed in Thayer v. California Development Co.,[6] and as emphasized in nearly all succeeding cases, particularly in the Pipe Line Cases,[7] was reaffirmed, "dedication" to public service being held as essential as the "dedication" of a highway.[8] The court had previously declared, when it expressly held unconstitutional another provision of the California statute, that the legislature cannot declare what shall constitute a public utility, stating definitely that "The legislature possesses no such power."[9] The same view has been expressed in previous volumes of the CALIFORNIA LAW REVIEW.[10]

The necessary effect of these decisions in California is to draw a distinct line between businesses now acknowledged as public callings and so-called private businesses or callings, and to make the change from a private to a public calling depend upon a "dedication" to public service by the owner. Furthermore, the owner may, according to the principal case, be unable to make such a "dedication" if under contract to furnish others at a given price.[11] Is such an analysis of the law sound?

That the "dedication" doctrine is a fiction which does no good, but which only leads to confusion and misunderstanding seems clear, for "In making his property valuable to the public and offering it to the service of the public, the owner does merely what every business man does who invites indiscriminate public patronage,"[12] and "There is no purpose, actual or implied, to part with his proprietary control in the least degree."[13] Even the California court abandons the test of real "dedication" in cases

---

[6] (1912), 164 Cal. 117, 128 Pac. 21.

[7] Producers' Transportation Co. v. Railroad Com. (1917), 54 Cal. Dec. 583, 169 Pac. 59, P. U. R. 1918 B, 518; Associated Pipe Line Co. v. Railroad Com. (1917), 54 Cal. Dec. 588, 169 Pac. 62, L. R. A. 1918 C, 849, P. U. R. 1918 B, 633.

[8] San Francisco v. Grote (1898), 120 Cal. 59, 52 Pac. 127; Niles v. Los Angeles (1899), 125 Cal. 572, 58 Pac. 190. Two cases involving the dedication of highways are cited to show what evidence is required to show dedication to a public service.

[9] Associated Pipe Line Co. v. Railroad Com., supra, n. 7.

[10] See notes in 2 California Law Review, 494, and 6 California Law Review, 146, in the former of which the decision of the United States Supreme Court in The Pipe Line Cases (1914), 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 956, is criticized as technically unsound, yet liberal, and in the latter of which the California Pipe Line Cases are defended as sound on principle. In the view of the present writer both notes are open to serious question, the latter in particular being unsound.

[11] See note on this point on another page of this issue of the Review.

[12] Freund, The Police Power, § 372; Wiel, Water Rights in Western States (3d ed.) p. 1116.

[13] Id.

where corporations or persons engage in a business which the court recognizes as public and will there hold the mere act of engaging in the business a sufficient dedication.[14] In other cases the court will find a "dedication" on slight evidence.[15]

The fallacy of talking about "dedication" in connection with the regulation of utilities is apparent when we consider that "agencies become public utilities independent of a desire of the owners of such agencies and irrespective of any voluntary devotion of their property to public use."[16] For "a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation."[17]

What then is the nature of the question as to when a business is subject to price and service regulations? Is it fundamentally a constitutional question of property or simply a question of policy embraced within the police power and subject exclusively to legislative determination?

That the early common law upheld the regulation of practically every business, including that of the smith,[18] the barber, the merchant, the surgeon and others is not open to question.[19] No distinction, it seems, was drawn between "private" business and "public" business, for the term "business" necessarily implies relations with the public, and to speak of "private business" and "public business" is a contradiction in terms.[20] Furthermore, the abandonment of these regulations was in no way due to any conviction that they were not properly questions of policy under the police power, but to the growth of the economic theory of *laissez faire*.[21] Under the influence of this economic theory courts even refused to uphold the regulation of utilities now uniformly admitted to be public.[22] With the growth of big business concerns, however, and the rapid development of monopolies the *laissez faire*

---

[14] Pinney & Boyle Co. v. Los Angeles Gas etc. Corp. (1914), 168 Cal. 12, 141 Pac. 620, L. R. A. 1915 C, 282, Ann. Cas. 1915 D, 471.

[15] Palermo Land & Water Co. v. Railroad Com. (1916), 173 Cal. 380, 160 Pac. 228, P. U. R. 1917 A, 447. An agreement in a contract to furnish water at the price fixed by law was held sufficient to show a "dedication".

[16] Control of Public Utilities in California, by John M. Eshleman, 2 California Law Review, 104.

[17] German Alliance Ins. Co. v. Lewis (1914), 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. Rep. 612, L. R. A. 1915 C, 1189.

[18] Jackson v. Rogers (1683), 2 Show. K. B. 327, 89 Eng. Rep. R. 968.

[19] Governmental Regulation of Prices, Eugene A. Gillmore, 17 Green Bag, 627; Public Callings and the Trust Problem, Bruce Wyman, 17 Harvard Law Review, 156; Railroad Rate Regulation, Beale and Wyman, § 32; note, 28 Harvard Law Review, 84; Business Jurisprudence, Edward A. Adler, 28 Harvard Law Review, 135.

[20] Adler, Business Jurisprudence, supra, n. 19.

[21] Note, 28 Harvard Law Review, 84; Gilmore, Regulation of Prices, supra, n. 19.

[22] McCanne v. Norwich Gas Co. (1862), 30 Conn. 521.

theory perished and regulative legislation began anew, the first important case going to the United States Supreme Court being Munn v. Illinois,[23] in which that court upheld an Illinois statute regulating grain elevators because the court found them to be "affected with a public interest", subject to regulation under the police power largely because they were monopolies. The monopoly theory, however, has not limited the later decisions of the same court, but the principle of public welfare has been liberally construed so as to permit the regulation of pipe lines,[24] insurance,[25] sale and distribution of water, [26] taxicab companies,[27] and hours and compensation of labor,[28] and no case has been found in which the United States Supreme Court has given any sanction to the theory that regulation violates the federal constitution, or in which that court has refused to uphold any declaration by a state legislature that a business is public.

The California court, so far as discovered, stands alone in flatly holding unconstitutional a provision of an act declaring certain businesses public,[29] but there are other jurisdictions which have stated that legislative fiat cannot make a business, in its nature private, public and which have avoided the necessity of declaring provisions unconstitutional by resorting to interpretation as in the principal case.[30] There is a tendency, however, to uphold the acts of the legislatures and to let the wording of the statutes rather than the nature of the business govern.[31] California's railroad commission has from the first viewed the question as one of policy,[32] in accord with the view of the United

---

[23] (1876), 94 U. S. 113.

[24] The Pipe Line Cases (1913), supra, n. 10.

[25] German Alliance Ins. Co. v. Lewis, supra, n. 17.

[26] Spring Valley Water Works v. Schottler (1884), 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Van Dyke v. Geary (1917), 244 U. S. 39, 61 L. Ed. 973, 37 Sup. Ct. Rep. 483, P. U. R. 1917 E, 539.

[27] Terminal Taxicab Co. v. Kutz (1916), 241 U. S. 252, 60 L. Ed. 984, 36 Sup. Ct. Rep. 583, P. U. R. 1916 D, 972. Here Mr. Justice Holmes expressed a doubt as to whether an ordinary livery stable was a public utility, but intimated that the court would hold it to be such if so defined by statute.

[28] Stettler v. O'Hara (1914) 69 Ore. 519, 139 Pac. 743, affirmed without decision (1916), 243 U. S. 629, 61 L. Ed. 945, 37 Sup. Ct. Rep. 475. See note on this question (regulation of employment) 2 California Law Review, 405, by Dean William Carey Jones, in which a broad point of view is expressed.

[29] Associated Pipe Line Case, supra, n. 7.

[30] State etc. Com. v. Monarch etc. Co. (1915), 267 Ill. 528, 108 N. E. 716, P. U. R. 1915 D, 119; De Pauw University v. Public Service Co. (1917), 247 Fed. 183, P. U. R. 1918 C, 274 (Ore.). See note on Illinois cases, 11 Illinois Law Review, 281.

[31] L. R. A. 1918 C, 827, n., in which cases on mutual telephone companies are shown to be in conflict according to wording of various state statutes.

[32] Los Molinos etc. Co. et. al. v. Coneland Water Co. (1915), 8 Cal. Rd. Com. 24, practically contra to principal case; Becker v. California

States Supreme Court that "a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to government regulation."[33] the commission has, therefore, avoided such practical inconsistencies as may be found in the decisions of Thayer v. California Development Company and Palermo Land & Water Co. v. Railroad Commission.[34]

No decision has been found expressly holding that all businesses are public and vary in degree only, but California seems to recognize that any business may be made subject to public control if the owner makes the so-called "dedication",[35] and the general tendency is to extend regulation, some trying to hold that, while there is a distinction in kind rather than degree between private and public business, all monopolies are public.[36] This view, however, is now discredited,[37] but some eminent authorities hesitate to go the full length.[38] The United States Supreme Court has, however, gone far toward recognizing that the only distinction is one of degree and that the question is one of public welfare, to be handled under the police power, and one which raises no constitutional question of property.[39] Such, too, is the tendency of commissions[40] and state courts,[41] so that in time we may look for a general recognition of the fact that there is no distinct line between public and private business, and that what the California court is trying to uphold as a property right under the fourteenth amendment, in the face of the opposing view of

---

Development Co. (1914), 5 Cal. Rd. Com. 153, in which an opposite finding to that of Thayer v. Development Co. is made on the same facts.

[33] German Alliance Ins. Case, supra, n. 17.

[34] Thayer case, supra, n. 6. In this case an enormous company having a monopoly in supplying water to the Imperial Valley was held to be a private concern because it had made no "dedication" while in the Palermo case, supra, n. 15, a small pumping concern supplying 1600 acres was found to be a public utility.

[35] No expression has been found in any of the decisions which would indicate that the court limits the "dedication" doctrine.

[36] Public Callings and the Trust Problem, Bruce Wyman, supra, n. 19.

[37] Brass v. North Dakota (1894), 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857.

[38] Freund, The Police Power, § 375, p. 384, says: "The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation."

[39] German Alliance Ins. Case, supra, n. 17; Van Dyke v. Geary, supra, n. 26.

[40] Sharp v. Kranzburg (1918), P. U. R. 1918 D, 862 (South Dakota); Burford v. Consumers' Ditch Co. (1916), P. U. R. 1916 D, 448, (Wash.).

[41] McCook Irrigation etc. Co. v. Burtless (1915), 98 Neb. 141, 152 N. W. 334, P. U. R. 1915 C, 587, L. R. A. 1915 D, 1205; Yeatman v. Towers (1915), 126 Md. 513, 95 Atl. 158, P. U. R. 1915 E, 811.

the United States Supreme Court, is but one of policy and as such a question for the legislature.[42]

D. J. W.

CRIMINAL LAW: THE INDETERMINATE SENTENCE.—A series of cases recently before the California courts, of which *Ex parte Bouchard*[1] and *Ex parte Lee*[2] are examples, have called the attention of the lawyer and the layman to the indeterminate sentence law[3] passed by the last legislature. The constitutionality of that measure has been definitely settled in Ex parte Lee, and its applicability to all those committing the designated crimes since July 27, 1917, has been established. The preliminary legal questions having been settled, it may be proper to devote a few words to the penological theories involved in the statute.

Punishment serves four purposes: as a reparation for the crime, as a means of reforming the criminal, as a deterrent to others, and as protection to society. Tarde[4] characterizes these purposes by the terms, "expiatory, exemplary, reformatory, and sanitary." Historically emphasis has been placed successively upon each of these ends of punishment, and as first one and then another was placed in the foreground, the kind and amount of punishment have changed accordingly.

Various criteria have been used in determining the kind and amount of punishment to be inflicted upon the wrongdoer. In the earliest times, the rank of the person injured fixed the penalty; later the crime itself was the standard; and finally the criminal was considered in meting out the penalty he must suffer for his infraction of the law. The first criterion has practically disappeared from civilized nations; the second and the third are those now used in determining the penalty for the crime.

The forms of punishment now in common use are death, imprisonment, and fine. At one extreme stands capital punishment. Reformation has no part here, and the nature of the crime alone fixes the penalty. The character of the man found guilty of first degree murder, save as bearing on the question of parole or commutation of sentence, has nothing to do with the punishment decreed. At the opposite extreme from capital punish-

---

[42] As to the broad scope of the police power, and for unequivocal holdings that it is a matter which must be left to the legislative judgment where possible, see Munn v. Illinois, supra, n. 23; Atlantic Coast etc. R. R. v. Goldsboro (1914), 232 U. S. 548, 58 L. Ed. 721, 34 Sup. Ct. Rep. 364; Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186; United R. R. v. San Francisco (1917), 239 Fed. 987; Erie R. R. Co. v. Williams (1914), 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. Rep. 761.

[1] (Oct. 16, 1918), 27 Cal. App. Dec. 495.
[2] (Mar. 8, 1918), 55 Cal. Dec. 489.
[3] Cal. Pen. Code, § 1168; Cal. Stats. 1917, Chap. 527, p. 665.
[4] Penal Philosophy, G. Tarde, Chap. VIII, pp. 473-527.